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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

BRUCE L. BAIR,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

PETITION FOR A WRIT OF CERTIORARI

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SEPTEMBER 1991

QUESTION PRESENTED

Whether, based solely upon an anonymous, unsubstantiated tip, which gave only petitioner's name and a bald accusation that he used marijuana, the commander had reasonable suspicion to lawfully order the petitioner to submit a urine sample.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Bruce L. Bair, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on June 21, 1991.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 32 M.J. 404 (C.M.A. 1991) (Appendix A). The United States Air Force Court of Military Review issued a decision on November 21, 1989, reported at 29 M.J. 862 (1989) (Appendix B).

JURISDICTION

The final order of the United States Court of Military Appeals was entered on June 21, 1991. The jurisdiction of this Court is invoked under Article 67a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867a (Supp. 1991), and 28 U.S.C. § 1259(3) (Supp. 1991).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment provides in pertinent part:

> The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . .

STATEMENT OF THE CASE

On July 21, 1988, the first sergeant of the 355th Aircraft Generation Squadron, Davis-Monthan Air Force Base, Arizona, received information from the base security police that an anonymous female caller had alleged that the petitioner and another named airman had used marijuana. The call contained no specific details indicating where any drug abuse by the petitioner may have occurred. The first sergeant relayed this information to the squadron commander, Lieutenant Colonel (then Major) Kind. Lieutenant Colonel Kind believed, but was not sure, that the reported use had been the previous weekend.

The commander testified that he was "shocked by the news" because the petitioner was one of his "best troops." Further, Lieutenant Colonel Kind said he found it "very, very difficult to believe" that the petitioner had used drugs, but since he commanded a flightline organization, he believed safety concerns dictated an order for the petitioner to submit a command-directed urinalysis sample.

Other than the information which he received from the first sergeant, Lieutenant Colonel Kind had no other reason to suspect that the petitioner may have been using drugs, and if it had not been for the telephone call, he would have no reason to order a command-directed urinalysis. When asked if he had a reasonable suspicion, Lieutenant Colonel Kind said he believed that he had a reasonable *doubt* that the petitioner had used drugs. He also said that he had thought the chances that the anonymous tip that the petitioner had used drugs was true was a "small possibility."

The commander ordered the petitioner to submit a command-directed urine sample pursuant to Air Force Regulation 30-2, paragraph 5-8 (April 18, 1986). The appellant admitted during the providence inquiry that he violated the order by substituting in place of his own urine a mixture of water and grapefruit juice. The appellant also admitted that he had earlier requested urine from an airman under his supervision to substitute in place of his own.

Air Force Regulation 30-2, paragraph 5-8, authorizes commanders to direct a urinalysis test when there is a reasonable suspicion of drug abuse. Although stating this was a "close case" in upholding the denial of the defense's motion to suppress, the Court of Military Appeals held that the commander had the necessary "reasonable suspicion" to give petitioner the order to provide a urine sample, applying Fourth Amendment standards. The Court of Military Appeals relied on the fact that the informant named specific individuals, the drug used, and a general time frame the drug was used, in addition to the commander's concern with the harm that could result to flight operations if appellant was using marijuana. The courts below also relied on the fact that the commander was not presented with a blanket assertion that everybody in his organization used drugs.

REASONS FOR GRANTING THE WRIT

The writ should be granted because the United States Court of Military Appeals has improperly applied the Fourth Amendment standard regarding reasonable suspicion to this case. Petitioner asserts this is far from being a "close case." The petitioner stands convicted of a violation of a lawful order and solicitation of another to assist him in violating that order. Both offenses arise from the petitioner's response to an unlawful order from his commander to submit a urine sample. Petitioner contends his conviction cannot stand because the order failed

to meet the reasonable suspicion requirement of the applicable regulation and violated his rights against unreasonable search and seizure under the Fourth Amendment.

His conviction cannot stand because both offenses require as a factual predicate that the underlying order, the order to submit the urine sample, be lawful. *United States v. Wallace*, 2 M.J. 1 (C.M.A. 1976). The lawfulness of the order given to petitioner to submit the urine sample depends upon whether it was predicated upon reasonable suspicion as required by the regulation. *United States v. Bair*, 32 M.J. 404, 407, n.1 (C.M.A. 1991). This regulation is the only authority which allows the commander to give such orders to submit urine samples, and then only in appropriate circumstances.

Air Force Regulation 30-2, Social Actions Program, paragraph 5-8 (April 18, 1986), sets forth the requirements for a command-directed examination:

> The commander can refer a military member for urine testing when there is a reasonable suspicion of drug abuse . . . A command-directed examination may be conducted to determine a member's competency for duty and the need for counseling, rehabilitation, or other medical treatment:
>
> a. Commanders usually direct urine testing in all unusual circumstances of aberrant, bizarre, or unlawful behavior in which probable cause does not exist but there is reasonable suspicion of drug abuse. Such behavior may include, for example, unauthorized absences, violations of safety requirements, disobedience of direct orders, apprehension or investigation for drug offenses or intoxicated driving, involvement in crimes of violence, or other incidents involving repeated or serious breaches of discipline. . . . In addition, apathy or defective attitude, or personality change may, when examined in the context of other circumstances, lead to a reasonable suspicion of drug abuse and form the basis for command-directed urine testing.

> b. Results obtained from command-directed testing may be used to refer a member to the Drug Rehabilitation Program and in administrative discharge action. Results may *not* be used against the member in any disciplinary action under the UCMJ, nor may they be used on the issue of characterization of discharge in separation proceedings. . . .

(Emphasis in original). Appendix C.

The government is bound by its own regulations, especially when the regulation is one which affects the rights of individuals. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). Petitioner's commander certainly must be bound by the above regulation.

The commander testified he thought the urinalysis test would exculpate petitioner. Despite the commander's stated helpful motives, the Fourth Amendment's purpose is to protect specifically against such unwarranted intrusions. Because collection and testing of urine intrude upon a most basic reasonable expectation of privacy in our society, such intrusions must be deemed searches under the Fourth Amendment. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989). As such, the reasonable suspicion standard must be properly applied to petitioner's case.

Both the Air Force Court of Military Review and the Court of Military Appeals agreed to interpret "reasonable suspicion" under the Air Force regulation in accordance with the Fourth Amendment. *See United States v. Bair*, 29 M.J. 862, 864 (A.F.C.M.R. 1989) and *United States v. Bair*, 32 M.J. 404, 410 (C.M.A. 1991). Both courts failed, however, to properly apply the Fourth Amendment to petitioner's case.

In its decision, the Court of Military Appeals decided that reasonable suspicion may be created by an anonymous informant's tip which is corroborated solely by innocent details readily available to many people and in

no way indicative of the informant having access to personal facts about the petitioner's criminal capacity. This decision is contrary to the great weight of Fourth Amendment analysis concerning the reasonable suspicion standard and anonymous informants. The reasonable suspicion standard for limited searches without probable cause was adopted by this Honorable Court in *Terry v. Ohio*, 392 U.S. 1 (1968). In *Terry*, this Court found that a police officer may make an investigatory stop of a person if he concludes, in light of his experience, that criminal activity may be afoot. The officer making the stop must be able to articulate something more than an "inchoate and unparticularized suspicion or 'hunch.'" *Id.* at 27. The officer must be able to articulate facts which, taken together with rational inferences from those facts, reasonably warrant an intrusion. The pertinent facts in *Terry* were that the defendant and another suspect walked slowly past and looked in the same store front a total of 24 times, and they appeared to be conferring after each pass. Based on his experience the officer suspected that the defendant was "casing" the store for a robbery. He approached the defendant to question him and performed a pat down search for weapons.

This standard was recently further expanded to encompass anonymous informants in *Alabama v. White*, 110 S. Ct. 2412 (1990). The facts in *White* much more strongly support a finding of reasonable suspicion than those in petitioner's case, yet this Court even acknowledged it was "close" as to whether there were sufficient indicia of reliability to justify an investigatory stop. *Id.* at 2417. There, an anonymous informant telephoned the police and stated that Ms. White would be leaving 235-C Lynwood Terrace Apartments at a particular time in a brown Plymouth station wagon with the right taillight lens broken, that she would be going to Dobey's Motel, and that she possessed about an ounce of cocaine inside a brown attaché case. The police officers went to the Lynwood Terrace Apartments and

saw a brown Plymouth station wagon with a broken right taillight in front of the 235 building. They observed Ms. White leave the building (although with nothing in her hands), get in the brown station wagon, and drive to Dobey's Motel. Once stopped, Ms. White consented to a search of her car. The police officers found a locked brown attaché case containing marijuana. The officers found three miligrams of cocaine in Ms. White's purse when processing her for arrest at the police station. In petitioner's case, we have no such details.

This Court abandoned the two-pronged *Aguilar-Spinelli* [1] test in favor of a "totality of the circumstances" standard for determining whether an informant's tip establishes probable cause in *Illinois v. Gates*, 462 U.S. 213 (1983). However, an informant's veracity, reliability and basis of knowledge, factors under the *Aguilar-Spinelli* test, remain highly relevant in determining whether an informant's tip establishes probable cause or reasonable suspicion, although a lesser showing is required for the latter. *Alabama v. White*, 110 S. Ct. 2412, 2415 (1990). Even with all the detailed facts given by the informant in *White*, this Court held that that tip, *standing alone*, would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized. *Id.* at 2416, *citing*, *Adams v. Williams*, 407 U.S. 143, 147 (1972). Here, the tip received by the commander was *standing alone*. It contained absolutely no facts whatsoever of coordination or indicia of reliability.

Reasonable suspicion is dependent upon both the content of the information and its degree of reliability—its quantity and quality. *Alabama v. White*, 496 U.S. ——, 110 S. Ct. 2412, 2416. The standard that should have been applied by the Court of Military Appeals was "if a tip has a relatively low degree of reliability, more in-

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[1] *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969).

formation will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable." *Id.*

In the instant case, the commander had absolutely no details, not even seemingly innocent ones, to corroborate the information provided. The anonymous tipster merely provided the appellant's name and an accusation of drug use. The commander was under the impression that the drug use had occurred the previous weekend; however, he could not remember specifically how he received that information. This tip did not contain any innocent or incriminating details, the corroboration of which could have established the indicia of reliability. All he had was a bald allegation of wrongdoing with no articulable objective facts to reasonably warrant suspicion of wrongdoing. Therefore, under the constitutionally mandated standards for testing it, the commander had no reasonable suspicion.

Even the commander's subjective perception of the facts displayed that he did not have reasonable suspicion. When asked if he had a reasonable suspicion, he indicated that it would be better characterized as a "reasonable doubt." The fact that he harbored significant doubt about the veracity of the allegations against the petitioner further weakens any determination of reasonable suspicion because the commander did not even have the gut-level experience of a police officer that a crime had occurred. The commander's testimony shows that he primarily acted out of concern for safety on the flightline. Although this concern may have been prudent, it did not meet the requirements of the Fourth Amendment.

The commander had several other, less intrusive, options than immediately ordering a command-directed urinalysis. To safeguard lives, he could have immediately removed the petitioner from any duties affecting flightline or aircraft safety. In doing so, he reasonably could have informed the petitioner of the anonymous tip and offered

him an opportunity to give a consensual urine sample. Alternatively, the commander could have not informed the petitioner of his reasons for changing his duties, and had the Air Force Office of Special Investigations begin an investigation into the petitioner's alleged drug involvement. Since the results of urinalysis tests generally take at least several weeks and since there were other options available, the Court of Appeals' concern for the "harm that could result to flight operations," *Bair*, 32 M.J. 404, 410 (C.M.A. 1991), is without merit.

This case is even more compelling than the dissenters' fears in *White*, that anyone with *any* knowledge about a given person to make him the target of a prank, or to harbor a grudge against him, would certainly be able to formulate a tip about him. *Alabama v. White*, 110 S. Ct. 2412, 2418 (1990). Indeed, the standard in the military is now that a mere accusation is sufficient for reasonable suspicion. In order to give a tip, an informant must *necessarily* give someone's name. Coming up with a crime, even a specific crime like marijuana use, doesn't require any brilliant thought. Certainly the fact that the caller didn't implicate the entire unit shouldn't be cited as an indicia of reliability.

In sum, petitioner submits the decision of the United States Court of Military Appeals upholding the commander's order to petitioner to submit a urine sample as based on reasonable suspicion violated his Fourth Amendment right against unreasonable searches and seizures. The decision below should be reversed.

CONCLUSION

The petitioner's case is worthy of Supreme Court review. In particular, this case offers a unique opportunity for this Court to define the power of the military commander to conduct warrantless searches based solely on anonymous, unsubstantiated tips.

Respectfully submitted,

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SEPTEMBER 1991

APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 64,124

ACM 27605

UNITED STATES,

Appellee,

v.

BRUCE L. BAIR, Technical Sergeant, U.S. Air Force,

Appellant.

Argued Dec. 17, 1990

Decided June 21, 1991

For Appellant: *Vaughan E. Taylor* (argued); *Colonel Richard F. O'Hair* and *Major Bernard E. Doyle, Jr.* (on brief); *Lieutenant Colonel Jeffrey R. Owens.*

For Appellee: *Captain Morris D. Davis* (argued); *Colonel Robert E. Giovagnoni* (on brief); *Major Brenda J. Hollis.*

Opinion of the Court

EVERETT, Senior Judge:

Pursuant to conditional pleas of guilty, *see* RCM 910 (a)(2), Manual for Courts-Martial, United States, 1984, a military judge sitting as a general court-martial convicted Technical Sergeant Bair of willfully disobeying a lawful order to submit a sample of his urine and of soliciting another to violate the same lawful order by providing appellant a sample that he could use in lieu of his own. *See* Arts. 90 and 134, Uniform Code of Military Justice, 10 USC §§ 890 and 934, respectively. Thereafter, the military judge sentenced appellant to a bad-conduct discharge, confinement for 9 months, and reduction to the

lowest enlisted grade. The convening authority approved the sentence, and the Court of Military Review affirmed. 29 MJ 862 (1989).

On appellant's petition, we agreed to decide whether his commander—who acted on the basis of "an anonymous, unsubstantiated tip"—had the requisite "reasonable suspicion" under paragraph 5-8, Air Force Regulation (AFR) 30-2, to lawfully order that Bair submit a urine sample for testing. We decide that he did.

I

The facts surrounding the offenses are fully set out in the opinion of the Court of Military Review in this case. 29 MJ at 863. For purposes of this appeal, we need focus only on the facts that led appellant's commander, Lieutenant Colonel Kind (then a major), to give the order.

Prior to entering his pleas, appellant made "a motion to dismiss or a motion for appropriate relief in that it is our contention that the order given in Charge I and relied on as the basis of Charge II was not a valid, lawful order. . . ." Before presenting any testimonial evidence, appellant offered as an appellate exhibit "a copy of AFR 30-2 that was in effect . . . at the time of the request for the commander directed urinalysis in this case—since it has changed since then."

The only evidence offered by either side on the motion was Kind's testimony. That testimony was clear and commendably candid; and it well sets up the legal issues that now are before this Court.

Under direct examination by defense counsel, Kind described what led to his order:

> A. . . . My first sergeant got a phone call from who I believe was the LE dask, the law enforcement desk. What it entailed was that they had received an anonymous phone call implicating Sergeant

Bair and another individual in the squadron saying that they had used marijuana. The real specifics . . . I'm not . . .

Q. You're not familiar with the specifics? Okay, then you were told this information by Chief Ivey, the First Sergeant?

A. Yes, correct.

Q. What was your reaction to that information?

A. I was fairly shocked. I didn't expect it.

Q. You didn't expect it, did you believe the information?

A. Well, I was hoping it wasn't true. I guess the fact that I just alluded to, Sergeant Bair was what I considered one of my best troops—I was certainly hoping it wasn't true. I found it very difficult to believe.

Q. When you got that information, what did you decide to do with that information?

A. The First Sergeant and I discussed it and we decided that since ours was a flightline organization, that we had to insure that there was no illegal drug use. Since my policy on the flightline had been that there would be no illegal drug abuse accepted since it's incompatible with good aircraft maintenance, we elected to do a commander directed urinalysis.

Q. I understand that. What was your reason for ordering Sergeant Bair to do this urinalysis?

A. The reason was the anonymous phone call. There was a shadow of a doubt.

Any ambiguity about what Kind was referring to when he mentioned that the anonymous phone call had caused "a shadow of a doubt" was clarified somewhat later in defense counsel's direct examination:

Q. That was my next question. In situations where this issue had come up, someone you knew and you thought was outstanding before, that the reason for giving a urinalysis was a chance for them to clear the issue once and for all.

A. Well, that and to eliminate any question of doubt. I would have to say that if I get an anonymous phone call on my First Sergeant, I'd do a commander directed urinalysis on him too—under the old rules.

Q. Excuse me, I didn't understand that?

A. Well, if I got an anonymous phone call on anybody, even as trusting as my First Sergeant, I would think I would do the same thing.

Subsequently, defense counsel sought to explore Kind's reasoning process in light of the applicable legal standard of "reasonable suspicion":

Q. Since I talked to you on Friday afternoon, have have you had an opportunity to talk with Captain Coakley [assistant trial counsel] or Captain Probasco [trial counsel]?

A. Captain Coakley.

Q. And did Captain Coakley explain to you what you would be testifying about today?

A. Just that . . . ah . . . well, I think so.

Q. Did he explain to you the issue of reasonable suspicion?

A. Ahh . . . yes.

Q. What was his definition of reasonable suspicion?

A. He did not give one.

Q. Do you feel, using the words "reasonable suspicion" that you had a reasonable suspicion?

A. I think I did.

Q. That Sergeant Bair was using drugs at the time?

A. I think there was reasonable doubt.

Q. Reasonable doubt?

A. Maybe that's the word I would use. Reasonable doubt.

Subsequent examination of Colonel Kind by defense counsel, and the military judge expanded somewhat Kind's testimony as to the anonymous tip, as to what other information Kind had had available, and as to what his response had been to the situation.

As to the tip: The anonymous tip had been from a female caller who had stated that Bair and Senior Airman Parker, another member of the same squadron, had used marijuana sometime recently—Kind believed but was not sure that the reported use had been the previous weekend. The tip contained no other details.

As to any other information available to Kind: He believed appellant was an "outstanding troop" and noncommissioned officer and had no reason, other than the tip, to believe Bair would use marijuana. Similarly, Kind knew Parker and had no reason—again, other than the tip—to believe that Parker used marijuana.

As to why he ordered the urinalysis: In light of Kind's paramount concern with flightline safety, *any* anonymous tip of this sort—even one involving a trustworthy subordinate—would cause "doubt" that would necessitate his ordering a commander-directed urinalysis. Indeed, as the military judge expressed it in one of her special findings prior to ruling on the motion, "Lt Colonel Kind said he viewed a suspicion of drug use as synonymous with flightline safety and ordered the test to protect the flightline, treating the call as true and assuming 'the worst case.'"

Ultimately, the military judge denied the motion. In the course of doing so, she articulated several "essential findings" of fact that are reflected in our recitation above, *see* RCM 905(d), as well as several underlying conclusions of law. The basis for the judge's ruling may be gleaned from these "conclusions":

> One: To be lawful a command must relate to a specific military duty and be one which the superior commissioned officer was *authorized to give to the accused. . . .*
>
> Two: *Air Force Regulation 30-2 gives guidelines to a commander for deciding when to order a commander directed urinalysis.* Commanders are told they can refer members when there is a *reasonable suspicion of drug abuse. . . .* While anonymous phone calls are odious, *the specific reference by the caller to the accused, to the drug used, and to a recent date when the caller said the accused had used marijuana, was for Lt Colonel Kind a reason to be suspicious and to order a urinalysis to assure the safety of all personnel using the flightline.*
>
> * * * *
>
> Five: *Lt Colonel Kind had a reason to order the test. His action,* even though it was based on an anonymous phone call, *was not arbitrary because the order was necessary and was a reasonable means to safeguard and protect the usefulness of the members of his command.* Lt Colonel Kind's order to the accused to provide an adequate urine specimen to the Davis-Monthan Hospital Laboratory on 21 July 1988 was a lawful order.

(Emphasis added).

II

As indicated earlier in this opinion, the regulation on which the parties in this case have focused throughout is AFR 30-2. Specifically, paragraph 5-8 of that regulation, dated 18 April 1986, prescribed:

> *A Command-Directed Examination.* The commander can refer a military member for urine testing when there is a reasonable suspicion of drug abuse . . . A command-directed examination may be

conducted to determine a member's competency for duty and the need for counseling, rehabilitation, or other medical treatment:

a. Commanders usually direct urine testing in all unusual circumstances of aberrant, bizarre, or unlawful behavior in which probable cause does not exist but there is a reasonable suspicion of drug abuse. Such behavior may include, for example, unauthorized absences, violations of safety requirements, disobedience of direct orders, apprehension or investigation for drug offenses or intoxicated driving, involvement in crimes of violence, or other incidents involving repeated or serious breaches of discipline . . . . In addition, apathy or defective attitude, or personality change may, when examined in the context of other circumstances, lead to a reasonable suspicion of drug abuse and form the basis for command-directed urine testing.

b. Results obtained from command-directed testing may be used to refer a member to the Drug Rehabilitation Program and in administrative discharge action. Results may *not* be used against the member in any disciplinary action under the UCMJ, nor may they be used on the issue of characterization of discharge in separation proceedings. . . .

Neither party could be convicted of violating Kind's order if that order—based on AFR 30-2—was not lawful.[1] Against this backdrop, this appeal presents two fundamental questions to this Court.

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[1] See *United States v. Wallace*, 2 MJ 1, 2 (CMA 1976) ("Inasmuch as the arrest order was illegal, the appellant's subsequent conviction for breaking arrest cannot be sustained."). Of course, the lawfulness of Kind's order—purportedly given pursuant to AFR 30-2—depends upon whether it was predicated upon "reasonable suspicion" as required by that regulation. *See United States v. Arguello*, 29 MJ 198, 203 (CMA 1989) ("The Supreme Court and this Court have also recognized that the Government is bound by its own regulations, especially when the regulation is one which con-

First, by what standard is "reasonable suspicion" to be measured in the context of AFR 30-2? Appellant urges that it must be measured by a Fourth Amendment standard; and, indeed, the court below, by virtue of the cases it cited in its opinion, implied that this is the standard it applied (although in so doing it ruled adversely to appellant's claims). 29 MJ at 864. Nonetheless, the Government contends that certain language in the regulation reflects "the fact that the drafters of the regulation did not use the term 'reasonable suspicion' in the same manner as the term is used in the criminal law arena." Specifically, the Government points to subparagraph "a" and to the fact that use of the results of a command-directed examination "in a criminal prosecution" is expressly proscribed. In place of the usual "criminal law" meaning of "reasonable suspicion," the Government argues:

> The logical meaning of the term in the regulation is that a commander cannot single out a member for command-directed testing for no reason at all and must have some basis for ordering the test. . . . The regulation was written for use by commanders, not legal technicians, and it is therefore unrealistic to define its terms by criminal law standards in this context.

Second, whatever the standard against which "reasonable suspicion" is to be measured in this context, did Kind have "reasonable suspicion" to order appellant to produce a sample of his urine? Appellant, of course,

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fers a right or which benefits an individual."). In some earlier cases cited by the defense, the Air Force Court of Military Review had reversed convictions for failing to obey orders to submit urine specimens, because it concluded the orders did not comply with AFR 30-2.

This case was tried in terms of the lawfulness of Kind's order *under AFR 30-2*, and the appeal focused on the same issue. Therefore, we need not consider whether any alternative basis might exist for holding this order to be lawful.

argues that he did not. Contrariwise, the Government submits that, by either a Fourth Amendment or some lesser standard, Kind had "reasonable suspicion" to order appellant to produce a sample of his urine under AFR 30-2.

A

The answer to the first question is reasonably suggested by a thoughtful analysis of the opinions of the Supreme Court in *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), and of our unanimous opinion last term in *United States v. Bickel*, 30 MJ 277 (CMA 1990), which applied *Skinner* and *Von Raab* to the military's urinalysis program.[2]

In *Von Raab*, the Supreme Court held that compulsory urinalyses of some employees of the Customs Service—whose duties, the Government could show, warranted such an intrusion—were not unreasonable under the Fourth Amendment. The majority reasoned:

> We have recognized, however, that the "operational realities of the workplace" may render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts. . . . [I]t is plain that certain forms of public employment may diminish privacy expectations even with respect to such personal searches. . . .

489 U.S. at 671, 109 S.Ct. at 1393 (citations omitted). Similarly, the Court in *Skinner* upheld Department of Transportation regulations requiring blood and urine tests

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[2] Although consent and probable-cause searches are authorized under Mil.R.Evid. 314 and 315, Manual for Courts-Martial, United States, 1984, the heart of the program is routine inspections sanctioned by Mil.R.Evid. 313.

to be given to certain railroad employees after major train accidents.

In neither instance, though, were results of such tests to be used as criminal evidence. Referring to this in *Skinner*, Justice Kennedy wrote for the majority:

> The FRA has prescribed toxicological tests, not to assist in the prosecution of employees but rather "to permit accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs."

489 U.S. at 620-21, 109 S.Ct. at 1415.

After fully considering these two opinions in the context of urinalyses under the rationale of the routine inspection of Mil.R.Evid. 313, Manual, *supra*, we concluded in *Bickel:*

> The very detailed regulations and policies established by the armed services for drug testing not only provide notice but also reduce the occasion for arbitrariness and abuse of discretion.
>
> Even though the positive results of drug tests usually are available to military prosecutors, we do not believe that requiring servicemembers to submit urine specimens is an unreasonable intrusion. We might take a different view if the drug testing were designed solely to obtain evidence for criminal prosecution; but, as we understand the military drug-testing program, that is not the case. A positive drug test may result in admonition or adverse administrative action for a servicemember—rather than in criminal prosecution.
>
> * * * *
>
> Thus, we conclude that compulsory urinalysis may be performed as part of a military inspection without any requirement of probable cause or individualized suspicion.

> The Supreme Court has not yet held that evidence discovered in a lawful administrative inspection is inadmissible in a criminal prosecution; and we doubt that the Court will ever apply the exclusionary rule to such evidence. Certainly, our Court has not done so—unless "the purported inspection" was "only a subterfuge for a search" for evidence to be used in a criminal prosecution. *See United States v. Thatcher*, 28 MJ 20, 24 (CMA 1989).

30 MJ at 286 (footnote omitted).

Of course, in *Bickel*, the "inspection" rationale under consideration concerned "examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, . . . conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft, or vehicle." Mil.R.Evid. 313(b). An inspection may include "an examination to locate and confiscate . . . contraband," but it may not be "for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings"; otherwise, by definition, it "is not an inspection." Mil.R.Evid. 313(b).

In Bair's case, unlike the usual scenario of an "inspection," a particular individual was singled out for the urinalysis—a situation that presents a much greater risk that the "inspection" simply is a subterfuge for an unlawful, nonprobable-cause search. Twice in *Bickel*, we took care to distinguish our holding there from a situation in which a urinalysis is "designed solely to obtain evidence for criminal prosecution" or "was 'only a subterfuge for a search' for evidence to be used in a criminal prosecution." 30 MJ at 285.

Mil.R.Evid. 313(b) also recognizes the special risk that such an "inspection" might actually be "for the primary purpose of obtaining evidence for use in a trial" and,

thus, in reality be a subterfuge for a search. Accordingly, the rule puts special restrictions on use of a urinalysis of a specific individual, as opposed to urinalyses of the whole or a nonindividualized part of a unit. In such instance, "the prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of" Mil.R.Evid. 313(b).

Perhaps in recognition of these concerns, the drafters of AFR 30-2 provided that the results of a command-directed urinalysis of a particular individual may not be used as direct evidence in a court-martial. This provision certainly argues in favor of a contention that command-directed urinalyses are not primarily searches for criminal evidence. Nonetheless, under *Skinner* and *Von Raab*, a urinalysis may not be directed merely at the whim of a commander or on some "hunch." Moreover, it would be hard to justify a compulsory urinalysis as reasonable for Fourth Amendment purposes if it purported to be pursuant to a military directive but flouted the requirements imposed by that same regulation to protect the privacy rights of servicemembers. *United States v. Daskam*, 31 MJ 77 (CMA 1990).

In arguing that Kind's order to appellant satisfied AFR 30-2, the Government contends that "reasonable suspicion" is used in the regulation in a way different from how it has been used in a line of cases concerned with suppression of evidence because of Fourth Amendment violations. *See, e.g., Alabama v. White*, 496 U.S. ——, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990); *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985); *Adams v. Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). In support of this contention, it is suggested that some of the "unusual circumstances of aberrant, bizarre, or unlawful behavior" set forth in subparagraph a of paragraph 5-8 would not

be an adequate basis for the conventional "reasonable suspicion."

Inherent in this contention are some dangers from the government's standpoint. If "reasonable suspicion" in the regulation has the undefined, but broad, scope that the Government suggests, then the regulation is much more susceptible to constitutional attack under *Skinner* and *VonRaab*. Thus, to avoid serious constitutional issues, we believe that "reasonable suspicion" in AFR 30-2 should be interpreted in harmony with the construction of that term by the Supreme Court in determining the scope of Fourth Amendment prohibitions. Moreover, unless the drafters of the regulation intended "reasonable suspicion" to be interpreted in this manner, we cannot fathom—and the Government has not suggested—why they employed this term.

B

The most recent Supreme Court discussion of "reasonable suspicion" is in *Alabama v. White, supra*, which involved a forcible stop of a vehicle because of an anonymous tip. There, the telephone report to the police was "that Vanessa White would be leaving 235-C Lynwood Terrace Apartments at a particular time in a brown Plymouth station wagon with the right taillight lens broken, that she would be going to Dobey's Motel, and that she would be in possession of about an ounce of cocaine inside a brown attaché case. Alerted by this tip, police "officers saw a brown Plymouth station wagon with a broken right taillight in the parking lot in front of the 235 building," and then they observed a woman leave the building—but not carrying an attaché case—and enter the vehicle within the time frame indicated by the anonymous informant. Following the vehicle, the police corroborated that it was proceeding towards Dobey's Motel, but they did not verify the woman's name or "the precise apartment from which she left." 110 S.Ct. at 2414, 2416.

Although acknowledging that "it is a close case," six of the justices "conclude[d] that under the totality of the circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of [White's] car." *Id.* at 2417.

Unlike *White*, the anonymous tip relayed to Lieutenant Colonel Kind contained no information as to the future of third parties and, therefore, it could not be corroborated by surveillance. *Cf. Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959). Moreover, here the tip contained less detail than the one received by the police in *White*—although even there a discrepancy existed as to the informant's prediction that the suspect would be carrying an attaché case. In view of these differences, did the information available to Kind satisfy the requirements of "reasonable suspicion"—which admittedly is "less demanding . . . than probable cause," *see United States v. Sokolow*, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989) (quoted in *Alabama v. White*, 110 S.Ct. at 2416).

The military judge, from her consideration of the evidence, answered this question in the affirmative. The Court of Military Review applied the test of "reasonable suspicion," as used in the context of criminal proceedings, and gave the same answer because the information received by Kind

> was not a blanket assertion that everybody in his organization used drugs. The information possessed some internal indicia of reliability in that it named specific individuals, the drug involved, and a general time frame the drug was used. The commander's decision to order a "command-directed" urinalysis was based on more than a "hunch" or a "generalized suspicion."

29 MJ at 864.

We recognize that here the commander was concerned with the harm that could result to flight operations if appellant were using marijuana, as had been reported. Thus, we might speculate that Lieutenant Colonel Kind might not have determined that "reasonable suspicion" existed if his squadron had been a headquarters unit involved in paper-pushing, rather than one concerned with flight operations. We do not believe that the magnitude of a possible harm from a suspected crime is irrelevant in determining the reasonableness of the suspicion. Thus, if a military commander has received an anonymous tip that a member of his unit is involved in sabotage or terrorist activity, he may be entitled to more leeway in making an investigative stop than if the reported offense is a barracks theft.

We recognize that—like *White*—this is a "close case." However, for the same reasons as did the Court of Military Review, we conclude that "reasonable suspicion" existed and that the order received by Bair was lawful.

III

The decision of the United States Air Force Court of Military Review is affirmed.

Judge COX concurs.

SULLIVAN, Chief Judge (concurring in the result):

I concur in the result and vote to affirm appellant's conviction for this lawful-order violation. Art. 92, Uniform Code of Military Justice, 10 USC § 892. Admittedly the regulation at issue in this case was poorly written since some of its language appears to be somewhat inconsistent. The examples provided in the regulation conflict with its use of the term of art ("reasonable suspicion"), at least as that term is found in Supreme Court cases. Nevertheless, viewing this regulation in its entirety, I would hold that an anonymous tip meets the regulatory

standard delineated in AFR 30-2. The examples for properly ordering a urinalysis are plainly less exacting than the standard fashioned for a criminal stop in *Alabama v. White*, 496 U.S. ——, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990).

The commander in this case was faced with a difficult choice. His decision, however, complied with the regulation in view of the following circumstances: The anonymous tip was specific and corroborated in minimum details. It identified recent use by appellant and a fellow squadron mate in their correct unit and identified the exact drug. These circumstances coupled with flight line safety concerns rendered this urinalysis order one contemplated within the regulation and hence lawful.

APPENDIX B

U.S. AIR FORCE COURT OF MILITARY REVIEW

ACM 27605

UNITED STATES

v.

TECHNICAL SERGEANT BRUCE L. BAIR,
FR 529-88-9390,
United States Air Force

Sentence Adjudicated 22 Feb. 1989

Decided 11 Nov. 1989

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair and Captain Bernard E. Doyle, Jr.

Appellate Counsel for the United States: Colonel Joe R. Lamport, Colonel Robert E. Giovagnoni, Major Terry M. Petrie, Captain Eric D. Placke and Captain Morris D. Davis.

Before HODGSON, SPILLMAN and PRATT, Appellate Military Judges.

DECISION

HODGSON, Chief Judge.

On appeal, as he did at trial, the appellant argues that an anonymous, unsubstantiated tip does not provide "reasonable suspicion" to order a "command-directed" urinalysis. Thus, appellant contends the order was not valid and he committed no offense by failing to obey it. We disagree.

Air Force directives give a commander the authority to order a "command-directed" examination of a member's urine where he has a "reasonable suspicion" of that individual's drug involvement. Air Force Regulation 30-2, *Social Actions Program*, para. 5-8 (18 April 1988) [hereinafter AFR 30-2]. We have earlier held that a "reasonable suspicion" is not a difficult standard for a commander to satisfy. *United States v. Browning*, 29 M.J. 628 (A.F.C.M.R. 1988). When it decided to require service members to submit to a urinalysis not supported by probable cause or justified as an inspection under Mil.R.Evid. 313, the Air Force made a policy decision that the results of such "command-directed" tests will not carry criminal sanctions and cannot be used to characterize discharges. AFR 30-2, para. 5-8b.

The facts before us are simple. On 21 July 1988, the Security Police at Davis-Monthan Air Force Base received an anonymous phone call stating that the appellant and a Senior Airman Gary Parker had recently used marijuana. This information was relayed to the appellant's commander who was "shocked" by the accusation and "found it very difficult to believe." Until this point he had no reason to think that the appellant was involved with drugs. The commander, nevertheless, ordered a "command-directed" urinalysis based on the phone call both to "exonerate" the appellant and to eliminate the possibility of drug abusers working on aircraft.

Upon being ordered to provide a "command-directed" urine specimen, the appellant approached a subordinate and asked him for a "clean" urine sample. The airman was "nervous" about the request because the appellant was a technical sergeant, and he reported the matter to the authorities. The appellant did not provide a urine sample as ordered, but instead substituted grapefruit juice.

The trial judge denied the appellant's motion to dismiss because the commander lacked "reasonable suspicion" to

order a urinalysis. The appellant then entered a conditional guilty plea to willfully disobeying a lawful order to provide a urine specimen and soliciting another to violate the order. *See* R.C.M. 910(a)(2).

For the last three decades, drug usage and drug trafficking in the Armed Forces have posed a substantial threat to its readiness and efficiency. In the civilian sector, drug abuse has cost billions of dollars in health cost, lost industrial production and has wasted thousands of lives. Both segments of the population, civilian and military, have sought ways to identify drug abuse.

The military community has elected to use a urinalysis program as one means to reduce drug abuse among its members. The test results can be used in a criminal proceeding if they are admissible under the Military Rules of Evidence. In situations where a commander lacks probable cause, he may still order a service member to provide a urine sample if he has a "reasonable suspicion" that the individual is involved with drugs. Because the reasonable suspicion search is "warrantless," the individual whose urine tests positive for drugs in such a search is not subject to criminal sanctions although he may be administraitvely separated. As we have mentioned, however, his drug usage cannot be used to characterize his discharge.

Warrantless, suspiciousless drug testing programs for public employees have been upheld by the Supreme Court against Fourth Amendment challenges. *See Skinner v. Railway Labor Executives Association*, 489 U.S. 689, 109 S.Ct. 1402, 108 L.Ed.2d 639 (1989) and *Treasury Employees v. Von Raab*, 489 U.S. 685, 109 S.Ct. 214, 102 L.Ed.2d 206 (1989). In each of the above situations, the Supreme Court concluded that the government's "compelling interest" in public safety outweighed private interests and made the searches reasonable.

It is recognized that the "expectation of privacy" is different in the military than it is in civilian life. *Com-*

mittee for GI Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975). Further, the military community is unique in so many ways that it must respond to needs and goals not present in the civilian sector. *See Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983). Accordingly, if the order to an individual to provide a urine sample had a valid military purpose and met the conditions set forth in the underlying directive, it is enforceable. *United States v. Russo*, 50 C.M.R. 650 (C.M.A. 1975); *Chilcott v. Orr*, 747 F.2d 29 (1st Cir. 1984). Additionally, using the authority of a military order to obtain a urine specimen is a reasonable procedure in the military community. *Murray v. Haldeman, supra.*

An order designed to halt drug abuse among military members has a valid military interest and is disobeyed at the peril of the recipient. *See generally United States v. Dumford*, 28 M.J. 836 (A.F.C.M.R. 1989). Here, the question is whether the appellant's commander had a "reasonable suspicion" to issue such an order.

In the context of criminal proceedings, the federal courts have held that a "reasonable suspicion must be more than a mere hunch," *United States v. Pearson*, 791 F.2d 867, 870 (11th Cir. 1986), and be "more than a generalized suspicion of criminal activity." *United States v. Sandler*, 625 F.2d 537, 539 (5th Cir. 1980). As we have stated earlier in this opinion, "reasonable suspicion" is not a difficult standard to meet. Here, the information relayed to the appellant's commander was more "than a generalized suspicion of criminal activity" or "hunch." What the commander was told was not a blanket assertion that everybody in his organization used drugs. The information possessed some internal indicia of reliability in that it named specific individuals, the drug involved, and a general time frame the drug was used. The commander's decision to order a "command-directed" urinalysis was based on more than a "hunch" or a "generalized suspicion."

We are not suggesting that an anonymous tip will always provide a reasonable suspicion" to justify a "command-directed" urinalysis. The facts here, however, amount to more than a "mere hunch," and the appellant's commander was justified in taking the action he did. Of course, command-directed urinalyses do not ordinarily support punitive action. In this case, we have held that the appellant was properly ordered to take a urinalysis based on reasonable suspicion. At that point he was subject only to administrative sanctions because the test was based on reasonable suspicion. What made his conduct a proper subject of a court-martial was his refusal to obey the order to provide the urine sample. He was not court-martialled, nor could he have been, for the positive results of the urinalysis.

One final concern. What is a commander to do when he or she is given information of individual's possible drug involvement? Should the individual be allowed to continue unchecked in a job that might endanger his life and those around him? In our view there is a compelling public interest in safeguarding the unit's mission that outweighs an individual's privacy interests. This is particularly so as here, where the intrusion is minor and carries no criminal sanctions. The commander would have been remiss if he had ignored the information and done nothing. *See generally United States v. Muniz*, 23 M.J. 201 (C.M.A. 1987).

Finally, appellate defense counsel suggest that the appellant's "good military character, outstanding leadership and duty performance" make a sentence that includes a bad conduct discharge, confinement for nine months, and reduction to airman basic inappropriate. We do not agree. Willfully disobeying an order strikes at the heart of military discipline and soliciting a subordinate to provide assistance only compounds the misconduct. Further, an examination of the record discloses that the appellant previously received non-judicial punishment for wrong-

fully using marijuana and a conviction by special court-martial for larceny and wrongfully possessing marijuana. We may, of course, consider the appellant's entire military record when determining sentence appropriateness. *United States v. Cavallaro*, 3 U.S.C.M.A. 653, 14 C.M.R. 71 (1954); *see also United States v. Shumacher*, 11 M.J. 612 (A.C.M.R. 1981). The sentence is entirely appropriate. *See United States v. Holt*, 28 M.J. 835 (A.F.C.M.R. 1989). For the reasons stated, the findings of guilty and the sentence are

AFFIRMED.

Judges SPILLMAN and PRATT concur.

APPENDIX C

Chapter 5

DRUG TESTING

* * * *

5-8. A Command-Directed Examination. The commander can refer a military member for drug testing when there is a reasonable suspicion of drug abuse or when it is conducted as an examination of a specified member in conjunction with a member's participation in a DOD drug treatment and rehabilitation program. A command-directed examination may be conducted to determine a member's competency for duty and the need for counseling, rehabilitation, or other medical treatment:

a. Commanders usually direct drug testing in all unusual circumstances of aberrant, bizarre, or unlawful behavior in which probable cause does not exist but there is a reasonable suspicion of drug abuse. Such behavior may include, for example, unauthorized absences, violations of safety requirements, disobedience of direct orders, apprehension or investigation for drug offenses or intoxicated driving, involvement in crimes of violence, or other incidents involving repeated or serious breaches of discipline. Individuals should be referred for a drug test as soon as possible after the behavioral incident, but not so soon as to prevent recent use from showing up on the test (for example, about 2 to 4 hours). In addition, apathy or defective attitude, or personality change may, when examined in the context of other circumstances, lead to a reasonable suspicion of drug abuse and form the basis for command-directed drug testing.

b. Results obtained from command-directed testing may be used to refer a member for evaluation and in administrative discharge action. Results may *not* be used against the member in any disciplinary action under the UCMJ, nor may they be used on the issue of charac-

terization of discharge in separation proceedings. However, the limitations of this paragraph on the use of the results do not apply to:

(1) The introduction of evidence for impeachment or rebuttal purposes in any proceeding in which the evidence of drug abuse (or lack thereof) has been first introduced by the member.

(2) Disciplinary or other action based on independently derived evidence, including evidence of drug abuse after the member's first entry into the SART Program.

* * * *

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